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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TYRONE TATE, Defendant and Appellant.	B287447 (Los Angeles County Super. Ct. No. MA071443)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shannon Knight, Judge. Affirmed and remanded.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez, Supervising Deputy Attorney General, Noah P. Hill, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Tyrone Tate (defendant) appeals from convictions for making criminal threats, violating a prior domestic violence restraining order, and vandalism. The convictions stem from a series of events one afternoon and evening when defendant threatened to beat Jasmine A., the mother of his children; punched through a window at the apartment where Jasmine and the children were living; and accosted Jasmine in the apartment—smacking a phone out of her hand when she said she was calling the police. We principally consider whether the trial court correctly rejected a defense *Batson/Wheeler*[1] motion, whether the court should have excluded evidence of defendant's prior domestic violence convictions as unduly prejudicial, whether the prosecution presented sufficient evidence to justify the jury's criminal threats verdict, and whether the vandalism conviction must be reversed because defendant was living in the apartment with Jasmine and the children (or so he claims) and cannot be guilty of vandalizing his own home.

I

A

Before being charged with the criminal offenses in this case, defendant sustained two prior misdemeanor domestic-violence-related convictions. There was a 2014 conviction (the offense conduct took place in 2013) for violating Penal Code[2]

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[1] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

[2] Undesignated statutory references that follow are to the Penal Code.

section 243, subdivision (e)(1) (spousal battery). There was also a 2016 conviction for the same offense. Jasmine was the victim of the 2016 spousal battery, an episode in which defendant punched her, spit on her, and called her and her sisters "faggot bitches." The criminal court hearing the 2016 case issued a protective order barring defendant from having contact with Jasmine—and that protective order remained in force on June 11, 2017. (As we later discuss, the fact of defendant's 2014 misdemeanor conviction and defendant's 2016 misdemeanor conviction plus the associated details we have related were admitted in evidence at trial in this case.)

B

On June 11, 2017, defendant engaged in the conduct that gave rise to the charges tried to the jury in this case. Jasmine was the prosecution's principal witness at trial. During opening statements, the prosecution warned the jury that Jasmine, who suffered from a learning disability, would give testimony that would be "difficult . . . because she tends to be all over the place." The prediction proved accurate. But certain key strands of her testimony were coherent and consistent, even while various other aspects were not.

In the afternoon or early evening on June 11, defendant, Jasmine, and two of their children were at Jasmine's cousin's home for a family gathering occasioned by the death of her uncle. Defendant began arguing with Jasmine because, when several of her male cousins whom defendant disliked arrived at the home, he wanted to leave with the children while Jasmine wanted to stay. Defendant told Jasmine to get her stuff so they could leave—admonishing her, "Hurry up before I beat your ass." As

recounted by Jasmine at trial, defendant also told her, "I'll beat your motherfucking ass if you don't grab these kids and let's go."

After initially refusing, Jasmine complied with defendant's demand because she wanted to avoid an altercation at her cousin's house, as well as embarrassment from defendant making more of a "scene." Jasmine testified she travelled back to her apartment complex in a van with defendant, their two children, and six other minors who were her younger brothers or cousins; she was inconsistent on whether defendant was driving and whether defendant was present in the van for all or part of the trip (and during the preliminary hearing, she testified she was not in the van but traveled by separate vehicle). While in the van, Jasmine told defendant she was going to get her keys and return to her cousin's house and defendant responded she "was not going nowhere" or "he would beat [her] ass." Defendant also called Jasmine derogatory names, including, as she recounted it, "faggot bitches."

Jasmine's testimony about what ensued once she and defendant arrived at the apartment complex was disjointed. She initially testified defendant let her and the children out on the sidewalk outside the complex and they then ran into the apartment where she lived, Apartment 8. Jasmine explained defendant had taken her keys to the apartment but she had left the door unlocked. Once inside, and with defendant "already mad" and still threatening to "beat [her] ass," she had one of the children lock the apartment door. Not long thereafter, defendant walked to one of the apartment's windows, continued arguing with Jasmine and demanded she let him in, and ultimately broke the window with his fist to gain entry into the apartment (photos of the broken window and blood on the windowsill from

lacerations defendant sustained to his hand were admitted at trial). Later in her testimony, however, Jasmine provided a partially contradictory account of the sequence of events—including inconsistent testimony about whether defendant brandished a baseball bat before or after breaking the window. Jasmine's testimony that defendant threatened to beat her and broke the window to enter the apartment, however, remained consistent.

After defendant broke the window, Jasmine grabbed her cousin's cell phone and told defendant she was calling the police. Defendant slapped the phone out of Jasmine's hand, causing it to break. Jasmine then used her own cell phone to call 911. A recording of her call with the 911 operator was played for the jury at trial and captured some of what was occurring. Jasmine told the operator defendant had taken her car keys and broken the apartment window. Jasmine also asked the operator to "hurry up because he planning on coming back in" (suggesting defendant had already come inside the apartment but was back outside at the time) and because "he got a bat in his hands." Jasmine can also be heard on the recording saying: "He's coming through my window! Get out! Get out! You broke my window get out!"

Jasmine testified she fled the apartment (with one or more of the children in her care) and ran to defendant's mother's apartment in the same complex, Apartment 20.[3] Once inside that

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[3] Defendant's mother testified at trial and confirmed Jasmine had come to her apartment before the police arrived to speak to her brother (Jasmine's brother and defendant's mother were dating and living together in Apartment 20 at the time). Defendant's mother said she was in her bedroom at the time and "didn't see anything."

apartment, police officers who responded to the apartment complex called Jasmine on her phone and told her to come outside.

One of the responding officers was Los Angeles County Deputy Sheriff Matthew Bistline. He testified that when he first encountered Jasmine at the apartment complex she appeared "frightened" and "upset," adding that she was crying, had difficulty speaking, and her hands were shaking. When Jasmine was asked at trial how she felt as a result of defendant telling her he would "beat [her] ass," she answered, "I was scared, and I'm still scared." She reiterated she had been afraid at several other points during her testimony, elaborating in response to one question that defendant was "bipolar" and she felt "[h]e could have killed me."

Deputy Bistline arrested defendant at the apartment complex and transported him to a hospital for the cuts on his hand caused by punching out the window. In a Mirandized interview at the hospital, defendant admitted he argued with Jasmine, he broke the apartment window, and he pulled a cell phone from her hand and threw the phone to the ground; defendant denied threatening Jasmine or brandishing a bat.

C

The criminal charges against defendant for resolution at trial were robbery (for taking Jasmine's keys), burglary (for breaking into Apartment 8 with intent to commit assault with a deadly weapon, i.e., the baseball bat), making criminal threats (the "beat your ass" statements), violating a domestic violence restraining order (§ 166, subd. (c)(4)), dissuading a witness (for slapping the phone out of Jasmine's hand when she said she was

calling the police), and misdemeanor vandalism (for breaking the window). During closing argument, defendant's attorney essentially conceded guilt on the violating a restraining order and vandalism charges but asked the jury to find him not guilty of the remainder of the charged offenses.[4] The jury largely—but not entirely—adopted the defense position. The jury convicted defendant on the conceded charges (finding true the sentencing allegation accompanying the violation of the restraining order charge), plus the charge for making criminal threats; it found him not guilty of the remainder of the alleged crimes.

The trial court sentenced defendant to nine years in prison. The sentence was comprised of the middle term of two years for the criminal threats conviction, doubled pursuant to the Three Strikes law (the court having rejected a defense *Romero*[5] motion), plus a five-year section 667, subdivision (a)(1) enhancement for sustaining a prior serious felony conviction. The court imposed a concurrent 364-day jail sentence for the vandalism conviction and ordered the four-year sentence it imposed for the violating a restraining order conviction stayed pursuant to section 654. As for fines and fees, the court imposed a $2,700 restitution fine (an amount in excess of the statutory minimum) without objection, a

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[4] Although conceding guilt on the violating a restraining order charge, the defense asked the jury to reject an allegation accompanying the charge that asked the jury to find defendant's commission of the violation involved an act of violence or a credible threat of violence.

[5] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

$120 court operations assessment, a $90 criminal conviction assessment, and a $10 crime prevention fine.

II

Defendant advances seven arguments on appeal, four that seek reversal of one or more of his convictions and three that challenge aspects of his sentence. All are meritless, save one of the sentencing-related claims.

Seeking wholesale reversal of the judgment, defendant argues the trial court wrongly denied a defense *Batson/Wheeler* motion challenging the prosecution's use of a peremptory challenge against a Black prospective juror. The trial court expressly found the defense had failed to establish a prima facie case that the peremptory challenge was attributable to intentional discrimination and defendant does not challenge that finding, instead jumping straight to attacking the genuineness of the nondiscriminatory reasons the prosecution gave for removing the juror. The failure to challenge the prima facie case finding (which is in any event unassailable) dooms defendant's appeal of the *Batson/Wheeler* ruling.

The remainder of defendant's appellate challenges to his convictions fare no better. The trial court did not abuse its discretion in concluding the probative value of the prior domestic violence convictions, admitted pursuant to Evidence Code section 1109, was not substantially outweighed by a substantial danger of undue prejudice. There is substantial evidence that defendant made a genuine threat causing Jasmine to reasonably suffer sustained fear, as required to be guilty of making criminal threats. And defendant's challenge to his vandalism conviction reduces to a question of whether there is substantial evidence he

was not a tenant living in Apartment 8 at the time he broke the window—we hold there is indeed such evidence.

As to defendant's sentencing claims, we reject the argument that the concurrent sentence on the vandalism count must be stayed pursuant to section 654 because there is substantial evidence supporting the trial court's implied finding that defendant harbored separate criminal objectives in committing both offenses. Defendant's challenge to fines and fees under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) is forfeited on these facts—i.e., where defendant made no ability to pay objection in the trial court despite imposition of a restitution fine that the applicable statute expressly authorized defendant to challenge on ability to pay grounds. We agree with defendant, however, that a remand is in order so the trial court may consider whether it wishes to exercise discretion to strike the five-year section 667, subdivision (a)(1) enhancement—discretion it did not have at the time it imposed sentence.

A

Before we explain why defendant's *Batson/Wheeler* challenge fails right out of the gate, some additional recounting of what occurred at trial—specifically, the voir dire proceedings—is necessary.

1

The pool of prospective jurors sent to defendant's trial courtroom were examined in groups of 18, with additional prospective jurors drawn from the audience when jurors were excused for cause or by peremptory challenge. After challenges for cause, a Black prospective juror, Juror No. 24 (Juror 24), was

included among the 18 for voir dire by the court and counsel. There were three additional Black jurors in the group of 18 plus at least one more in the audience.

Answering basic voir dire questions posed by the trial court, Juror 24 stated she was a case manager for what she described as the "homeless department," engaged, and a mother of four minor children. She had never served on a jury before. Neither the prosecution nor the defense posed any questions to Juror 24 specifically.

When it came time to exercise peremptory challenges, the prosecution used its first three challenges on prospective jurors who were not Black. With its fourth peremptory challenge, the prosecution asked to excuse Juror 24 and the defense made a *Batson/Wheeler* motion at sidebar. Briefly arguing the motion, the defense noted Juror 24 and defendant were both Black and the defense asserted nothing "came out . . . in any voir dire questioning that would support a race-neutral basis for excusing [Juror 24]."

After noting the presence of multiple other Black jurors in the group of 18 and the absence of any other peremptory strikes against Black prospective jurors during voir dire, the trial court found there had not been "a prima face showing of any improper exercise of [a] peremptory challenge." As encouraged by governing case law, however, the court invited the prosecution to state for the record its reasons for excusing Juror 24. This was the prosecution's response: "[Juror 24], out of the 12 folks, is the only case worker—social worker for the homeless department. I think just based on the nature of her work, I have a—just brought a judgment call on it, that she might sympathize a little more with [defendant] than with us, even though I didn't

specifically ask her about it. [¶] But more so than that, it is more of a body language issue to me. She seemed a little indifferent towards me, whereas everyone else was more open. [¶] And I will note that Juror No. 10 is African[-]American. And I have no reason to excuse her. I actually like her very much. [¶] I will accept the panel who are included. [¶] There are a number of African[-]Americans coming up as well that I will also accept." The trial court then offered the defense a chance to argue the motion further and counsel disputed seeing any "unpleasant" body language; counsel did not undertake any juror comparisons in an effort to demonstrate discriminatory purpose.

The trial court denied the *Batson/Wheeler* motion, expressly finding the prosecution's "race-neutral reason to be credible." Three Black jurors were ultimately seated on the trial jury.

2

"The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (*Foster v. Chatman* (2016) ___ U.S. ___, ___ [136 S.Ct. 1737, 1747]; accord, *Johnson v. California* (2005) 545 U.S. 162, 169, fn. 5 (*Johnson*).) But a showing of discriminatory purpose remains essential in a case challenging the strike of a single juror, just as in all others. (*Johnson*, *supra*, at pp. 170-171 ["*Batson*, of course, explicitly stated that the defendant ultimately carries the 'burden of persuasion' to '"prove the existence of purposeful discrimination"'"].)

Except in the rare case (unlike this one) where race discrimination is immediately apparent, a showing of discriminatory purpose is made by way of a three-step inquiry:

"'First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race [or other protected category] discrimination.'" (*People v. O'Malley* (2016) 62 Cal.4th 944, 974; see also *Johnson*, *supra*, 545 U.S. at p. 172 ["The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process"]; *People v. Williams* (2013) 56 Cal.4th 630, 653-654 [courts apply three-step framework to decide whether, under all the circumstances of a case, the presumption that a prosecutor uses peremptory challenges in a constitutional manner has been overcome].)

As explained in *People v. Scott* (2015) 61 Cal.4th 363 (*Scott*), our Supreme Court has repeatedly encouraged trial courts confronted with a *Batson/Wheeler* motion to invite prosecutors to state reasons for exercising a peremptory strike, even when finding no prima facie case of discrimination, to facilitate appellate review. (*Id.* at p. 388.) To avoid disincentivizing trial courts from making a prima facie finding and prosecutors from stating reasons when invited to do so, *Scott* also holds that "where (1) the trial court has determined that no prima facie case of discrimination exists, (2) the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, (3) the prosecutor provides nondiscriminatory reasons, and (4) the trial court determines

that the prosecutor's nondiscriminatory reasons are genuine, an appellate court should begin its analysis of the trial court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling." (*Id.* at pp. 388-389, 391; accord, *People v. Sánchez* (2016) 63 Cal.4th 411, 434.)

Defendant, however, does not challenge the trial court's finding that he made no prima facie case that the prosecution's strike of Juror 24 was racially discriminatory. His opening brief cites the standard of review for a challenge to a trial court's prima facie finding but then jumps straight to attacking the genuineness of the prosecution's reasons for excusing Juror 24 without any discussion of whether there was a prima facie case of discrimination. The Attorney General, in his respondent's brief, highlighted the absence of any pertinent argument challenging the trial court's first-stage *Batson/Wheeler* ruling, and defendant's reply brief still did not remedy the deficiency.[6] Because our Supreme Court has said that the first step of the *Batson/Wheeler* framework is where our review must start in a

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[6] Defendant's reply brief acknowledges *Scott*'s holding that requires us to decide the correctness of the trial court's finding that there was no prima facie case of discrimination before moving on to assessing issues arising at the second and third steps of the *Batson/Wheeler* inquiry. But defendant then argues that "since the record reveals no race-neutral reason to excuse [J]uror 24, the finding by the trial court that no prima[ ] facie case had been established was not supported by the record, so the inquiry cannot stop at the first stage." That is not a challenge to the existence of a prima face case; rather it is an attack on whether the prosecution could have a genuine reason for excusing Juror 24—in other words, a repetition of the legally flawed approach pursued in the opening brief.

case like this, and because defendant does not contest the trial court's first-stage ruling, defendant's *Batson/Wheeler* argument fails before it even gets started.

Furthermore, even if we review the correctness of what defendant does not actually challenge, the trial court was indeed correct to find defendant had not made out a prima facie case of discrimination. The question that must be answered when deciding whether a defendant has established a prima facie case is whether "the sum of the proffered facts gives 'rise to an inference of discriminatory purpose.'" (*Johnson*, *supra*, 545 U.S. at p. 169; accord, *Scott*, *supra*, 61 Cal.4th at p. 384.) Factors that prior cases have considered when assessing whether a prima facie case of discrimination exists include: whether the use of peremptory strikes discloses a pattern suggestive of discrimination (see, e.g., *Batson*, *supra*, 476 U.S. at p. 97; *Wheeler*, *supra*, 22 Cal.3d at p. 280); whether the defendant and the juror excused are of the same race (see, e.g., *People v. Bell* (2007) 40 Cal.4th 582, 597); whether the victim of a crime and the majority of jurors remaining after the use of peremptory challenges are of the same race (see, e.g., *Scott*, *supra*, at p. 384); whether excused jurors have little in common except for their cognizable group membership (see, e.g., *People v. Cunningham* (2015) 61 Cal.4th 609, 664 (*Cunningham*)); whether the party exercising peremptory strikes failed to engage the prospective juror(s) excused in more than desultory voir dire (see, e.g., *Scott*, *supra*, at p. 384); whether there are race-neutral grounds, apparent from and clearly established in the record, that necessarily dispel any inference of bias (see, e.g., *Cunningham*, *supra*, at p. 665; *Scott*, *supra*, at p. 384); and whether the party accused of improperly exercising peremptory challenges passed

on excusing members of that same group who were then seated on the jury (*Cunningham*, *supra*, at pp. 664-665).

A reviewing court accords deference to a trial judge's first-stage *Batson/Wheeler* ruling. (*People v. Jenkins* (2000) 22 Cal.4th 900, 993-994.) With that deference in mind (and really, even without it), the trial court here correctly ruled defendant had not satisfied the admittedly low threshold to establish a prima facie case of discrimination. There was no pattern suggestive of discrimination, the prosecution's use of peremptory challenges did not suggest the jurors the prosecution excused had little in common except for their cognizable group membership (indeed, quite the opposite), the defense put no information on the record about whether Jasmine and the majority of jurors remaining were of the same race, and the prosecution passed three Black jurors who were ultimately seated on the jury. On the other side of the equation, all that defendant might be left to say is that he and Juror 24 were of the same race and the prosecution did not specifically pose a question to Juror 24 during the limited time provided by the trial court for attorney voir dire. That is not enough to give rise to a prima facie inference of discrimination in light of the considerations we have mentioned that point in the other direction.

B

Notwithstanding the general bar on admitting propensity evidence in a criminal trial (Evid. Code, § 1101, subd. (a)), Evidence Code section 1109 makes evidence of a defendant's commission of "other domestic violence" admissible in a criminal trial where the defendant is accused of "an offense involving

domestic violence"—so long as the other domestic violence "is not inadmissible pursuant to [Evidence Code] Section 352."

Under Evidence Code section 1109, the trial court here admitted other domestic violence evidence against defendant: the fact of his 2014 spousal abuse misdemeanor conviction as well as the fact of his 2016 spousal abuse misdemeanor conviction plus the aforementioned detail concerning the commission of that offense against Jasmine. Defendant now argues this was error because the prior domestic violence evidence should have been excluded under Evidence Code section 352, i.e., because the probative value of the evidence was "substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." We review the trial court's decision to admit the other domestic violence evidence for abuse of discretion. (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138; see also *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 824 (*Daveggio and Michaud*).)

When undertaking the careful weighing process called for by Evidence Code section 352, "'trial judges must consider such factors as [the other domestic violence evidence's] nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the . . . other . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense.'" (*Daveggio and*

Michaud, *supra*, 4 Cal.5th at pp. 823-824.)[7] These considerations warranted admission of the other domestic violence evidence.

Defendant's prior domestic violence was quite recent, occurring with respect to the prior 2016 abuse against Jasmine roughly a year before the charged offenses and roughly four years before the charged offenses as to the crime that led to the 2014 conviction. Defendant's prior abuse of Jasmine the year before was obviously highly probative as to whether he had a propensity to abuse her again, especially in combination with the earlier domestic violence conviction that established something of a pattern. There was virtually no danger the other domestic violence evidence would confuse, mislead, or distract the jurors from their main inquiry because the presentation of the evidence was quick (by way of a stipulation and one short witness) and the trial court gave repeated instructions—both at the time the evidence was admitted and at the close of trial—that the evidence was admitted only for a limited purpose and should not be misunderstood as evidence that led to the charges in this case. In addition, the evidence of the two prior domestic violence misdemeanor convictions was not significantly more inflammatory than the charged offenses being tried: only details of the 2016 offense were presented at trial and the details were

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[7] *Daveggio and Michaud* concerned a prosecution in which evidence was admitted pursuant to Evidence Code section 1108, which permits introduction of other sex offenses in the same manner as section 1109 permits introduction of evidence of other domestic violence. Thus, in our view, *Daveggio and Michaud*'s discussion of the Evidence Code 352 analysis trial courts must undertake applies equally to evidence admitted pursuant to Evidence Code section 1109.

essentially on par with Jasmine's description of defendant's criminal conduct in this case (including the "faggot bitches" remark defendant was reported making in both instances, Jasmine's statement on the 911 recording that defendant had a bat, the undisputed evidence defendant broke the apartment window with his fist, and Jasmine's testimony—whether believed by the jury or not—that defendant, after coming through the window, slapped and pushed her while she was holding her baby).

Defendant's argument to the contrary is that the evidence of the 2016 spousal abuse against Jasmine was "especially inflammatory" because Jasmine's sister (the witness who described what happened) testified defendant spit on Jasmine in that instance. While certainly vile, we do not believe the spitting made the 2016 domestic violence episode meaningfully more inflammatory than defendant's reprehensible conduct that gave rise to the charged offenses. Defendant also argues the evidence of the 2016 domestic violence was prejudicial because Jasmine's sister's testimony was "vivid" while Jasmine's testimony was frequently contradictory. But arguing that the sister's testimony was prejudicial because it was more damaging runs afoul of our Supreme Court's repeated admonition that "'"'"'[e]vidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. . . . '"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues . . . ."' The prejudice that section 352 "'is designed to avoid is not the prejudice or damage

to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors.""""""" (*Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 824.) Using this accepted definition of prejudice, the trial court's finding that the other domestic violence evidence was not unduly prejudicial, and therefore admissible, was not an abuse of discretion.

C

At the close of the prosecution's case-in-chief, defendant made a section 1118.1 motion for acquittal on all charges—a motion the trial court denied. On appeal, defendant challenges the denial of the motion only with respect to the criminal threats count of conviction, arguing he was "simply blowing off steam" when threatening to beat Jasmine rather than making a "genuine threat." He also asserts there was insufficient evidence the threats caused Jasmine to be in reasonable sustained fear. We conclude there was substantial evidence supporting the elements of a criminal threats offense at the close of the prosecution's case. (See generally *People v. Gomez* (2018) 6 Cal.5th 243, 307 [trial court evaluates whether there is substantial evidence of the existence of each element of the offense charged and an appellate court reviews that determination de novo].)

"In order to prove a violation of section 422, [which proscribes making criminal threats,] the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the

threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. (See generally *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13 [ ].)" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228; see also CALCRIM No. 1300.) Defendant's challenge to the sufficiency of the evidence pertains to the last three of these elements.

There is substantial evidence establishing the gravity of purpose and immediate prospect of execution element. Jasmine testified to the clear and specific threats made by defendant—and on this point her testimony did not waiver. Also relevant to establishing defendant's gravity of purpose, of course, is the other domestic violence propensity evidence the jury heard that seriously undermines the assertion defendant makes now that he was "simply blowing off steam."

There is also ample evidence Jasmine experienced sustained fear as a result of defendant's threats and that her fear was reasonable under the circumstances. Jasmine repeatedly testified at trial that she experienced sustained fear, stating at one point "I was scared, and I'm still scared" when asked how she

felt as a result of defendant telling her he would "beat [her] ass."[8] Jasmine's testimony that she was afraid was corroborated by Deputy Bistline's testimony—he testified Jasmine was crying, shaking, and appeared frightened when he responded to her 911 call. There was also credible, solid evidence that Jasmine's fear was reasonable under the circumstances, including the evidence that defendant had beaten her in the past and defendant's use of his fist to punch through the apartment window—an act that clearly communicated he meant business and would use violence, even if it required harming himself.

D

Penal Code section 594, subdivision (a) states any person who maliciously damages "real or personal property not his or her own" is guilty of vandalism. The trial court instructed the jury with CALCRIM No. 2900, explaining the jury should convict defendant on the vandalism charge if it found he damaged personal property and he "did not own the property or owned the property with someone else."

Citing an arson case, *People v. Atkins* (2001) 25 Cal.4th 76, defendant argues the vandalism conviction should be reversed because the "malice requirement for vandalism requires the act

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[8] Defendant argues there was insufficient evidence of sustained fear because, he says, Jasmine's trial testimony was inconsistent with her testimony at the preliminary hearing—when she answered a question about how defendant's threats made her feel by saying she was "hurt." The argument suffers from two independent flaws. First, feeling hurt is not inconsistent with feeling afraid. Second, Jasmine did testify at the preliminary hearing that she felt "concerned for [her] safety."

be 'done with a design to do an intentional wrongful act . . . without any legal justification or excuse or claim of right." Defendant then further asserts he "had a claim of right to break the window to enter the apartment in which he was living to retrieve the keys to his van, after Jasmine locked him out of the apartment and took his keys." Putting aside, for argument's sake, our doubts that a lessor has an unqualified legal right to break his or her apartment window when locked out, defendant's argument hinges on a factual precondition: that the jury must have found defendant was a tenant of Apartment 8 when he broke the window. The argument fails because we view the evidence in the light most favorable to the verdict (*People v. Houston* (2012) 54 Cal.4th 1186, 1215; *People v. Riley* (2015) 240 Cal.App.4th 1152, 1165-1166 (*Riley*)) and there was substantial evidence on which the jury could have drawn the opposite conclusion.

No lease agreement for Apartment 8 was entered in evidence at trial. But Jasmine testified she was solely responsible for paying the rent for Apartment 8 and she never gave defendant keys to the apartment. Defendant's mother also testified Jasmine changed defendant's mailing address to her apartment, not Apartment 8, months before the date of the crimes of conviction. While there was conflicting evidence of where defendant was living on the date in question,[9] the other

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[9] Defendant's mother testified he was living in Apartment 8 with Jasmine. When asked a series of questions about whether defendant lived in Apartment 8, Jasmine gave the following answers:

Q On June 11th of this year, did [defendant] live with you at that location?

evidence we have highlighted is substantial evidence on which the jury could rely to find defendant had no claim of right to break the window. (*Riley*, *supra*, 240 Cal.App.4th at pp. 1165-1166 ["If our review of the record shows that there is substantial evidence to support the judgment, we must affirm, even if there is also substantial evidence to support a contrary conclusion and the jury might have reached a different result if it had believed other evidence"].)

E

"Section 654, subdivision (a) provides that '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.'" (*People v. Jackson* (2016) 1 Cal.5th 269, 353-354.) Defendant contends that in addition to applying section 654 to stay the sentence it imposed for the violating a restraining order conviction, the trial court should have stayed the concurrent

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A Yes.
Q He did live in Apartment 8?
A He was over there. He didn't live there. He was staying there.
Q What is the distinction to you? [¶] What does it mean being over there versus living there?
A He came over to visit his kids.
Q Where did [defendant] usually sleep at?
A If it's not my house, it's his mom's.

sentence it imposed for the vandalism conviction on section 654 grounds.

"Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives." (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) Where there is substantial evidence of multiple criminal objectives, section 654 does not bar separate punishment. (*People v. Harrison* (1989) 48 Cal.3d 321, 335 ["If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct'"]; see also *People v. Brents* (2012) 53 Cal.4th 599, 618 ["A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence"].)

As defendant and the Attorney General agree, this is a course of conduct case and the question is therefore whether substantial evidence supports the trial court's implied finding

that defendant's criminal threats and vandalism crimes involved separate objectives. There is—specifically, substantial evidence of an objective to harm Jasmine by instilling fear via threats and an objective to harm Jasmine by damaging property she would be responsible for paying to fix (as the tenant responsible for paying rent on Apartment 8).[10] (See, e.g., *People v. Mejia* (2017) 9 Cal.App.5th 1036, 1046-1047 [section 654 does not bar separate punishment for criminal threats and torture even if the threats were partly intended to break the victim's will and discourage her from fleeing; "mentally or emotionally terrorizing the victim by means of threats is an objective separate from the intent to cause extreme physical pain"]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1022 ["[I]n making the terrorist threats, the defendant intended to frighten whereas in committing arson an hour later the defendant intended to burn"].)

F

Relying on the recent opinion in *Dueñas*, *supra*, 30 Cal.App.5th 1157, defendant argues we should strike the various fines and assessments imposed by the trial court and remand so the trial court can determine whether defendant has the ability to pay them. Defendant concedes no ability to pay objection was made at the time of sentencing and the Attorney General argues the *Dueñas* claim is therefore forfeited. On these facts, we agree with the Attorney General.

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[10] Furthermore, there is no reason to believe breaking the window was merely incidental to commission of the criminal threats crime. Defendant could threaten Jasmine—and did threaten Jasmine—before and after the window was broken.

Defendant's sole argument to avoid forfeiture is the claim that *Dueñas* was an unforeseeable change in the law such that the failure to object on ability to pay grounds in the trial court should be excused. The trial court, however, imposed a restitution fine $2,400 in excess of the minimum statutory amount ($300), and the statute authorizing the fine expressly authorizes consideration of a defendant's ability to pay the fine under those circumstances. (§ 1202.4, subd. (c) ["The court shall impose the restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. . . . Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine . . ."].) Defendant nevertheless made no inability to pay objection. Without such an objection, adherence to general forfeiture principles is warranted as to all the fines and assessments—after all, if defendant opted not to make an ability to pay objection as to the $2,400 increase in the restitution fine, surely he would not have contested the $220 in additional financial obligations. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881 ["Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal"].)

G

When the trial court sentenced defendant, imposition of a section 667, subdivision (a)(1) five-year enhancement for sustaining a prior serious felony conviction was mandatory. (Former § 1385, subd. (b) ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667"].) A

recent legislative change, however, deletes the provision of section 1385 that makes imposition of a section 667 prior serious felony conviction enhancement mandatory (and related language in section 667 itself), thereby permitting trial courts to strike such enhancements when found to be in the interest of justice. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1, 2.)

All concerned agree that the change in law worked by Senate Bill 1393 applies retroactively to defendant. Defendant seeks a remand so the trial court may consider whether it wishes to exercise its discretion to strike the section 667, subdivision (a)(1) enhancement it imposed as part of defendant's sentence. The Attorney General opposes a remand, arguing the trial court surely would not exercise its discretion in defendant's favor having denied at sentencing his *Romero* motion and a motion to reduce the criminal threats and violating a restraining order convictions to misdemeanors.

We see no reliable indication on this record that a remand would be pointless. The trial court imposed less than the maximum sentence, and remarks the trial court made at sentencing concerning the motions made by defendant are an unreliable guide to how the court would or would not choose to exercise its Senate Bill 1393 discretion. We shall therefore remand the matter to find out.

DISPOSITION

The cause is remanded to the trial court to permit the court to consider whether it wishes to exercise its discretion to strike defendant's section 667, subdivision (a)(1) enhancement under section 1385. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.